COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts	D.T.E. 01-20

MOTION OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC. FOR PROTECTIVE TREATMENT OF CONFIDENTIAL INFORMATION

AT&T Communications of New England, Inc. ("AT&T") hereby requests that the Department of Telecommunications and Energy (the "Department") grant protection from public disclosure of certain confidential, competitively sensitive and proprietary information submitted in this proceeding in accordance with G.L. c. 25, § 5D. Specifically, AT&T requests that the following materials filed on September 7, 2001, be granted protective treatment because they contain competitively sensitive and highly proprietary information and trade secrets:

1. The attachments to AT&T's responses to VZ-ATT 1-38, 1-39, 1-70, 1-131 and 1-135; and

2. AT&T's responses to VZ-ATT 1-72, 1-114, 1-117 through 1-128, and 2-91.

These materials have already been provided to the Department, Verizon and those parties which have signed a protective agreement with AT&T in this docket. If these materials are placed in the public record, however, AT&T's competitors would be able to use them to gain an unfair competitive advantage. This in turn could serve to chill the future participation of AT&T

and other CLECs in proceedings such as the current one where the Department has sought their voluntary assistance.

I. LEGAL STANDARD.

Confidential information may be protected from public disclosure in accordance with G.L. c. 25, § 5D, which states in part that:

> The [D]epartment may protect from public disclosure trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be on the proponent of such protection to prove the need for such protection. Where the need has been found to exist, the [D]epartment shall protect only so much of the information as is necessary to meet such need.

The Department has recognized that competitively sensitive information is entitled to protective status. *See, e.g., Hearing Officer's Ruling On the Motion of CMRS Providers for Protective Treatment and Requests for Non-Disclosure Agreement*, D.P.U. 95-59B, at 7-8 (1997) (the Department recognized that competitively sensitive and proprietary information should be protected and that such protection is desirable as a matter of public policy in a competitive market). In determining whether certain information qualifies as a "trade secret,"[1] Massachusetts courts have considered the following:

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[1] Under Massachusetts law, a trade secret is "anything tangible or electronically kept or stored which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production or management information design, process, procedure, formula, invention or improvement." Mass. General Laws c. 266, § 30(4); *see also* Mass. General Laws c. 4, § 7. The Massachusetts Supreme Judicial Court, quoting from the Restatement of Torts, § 757, has further stated that "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors.... It may be a formula treating or preserving material, a pattern for a machine or other device, or a list of customers." *J.T. Healy and Son, Inc.* v. *James Murphy and Son, Inc*., 260 N.E.2d 723, 729 (1970). Massachusetts courts have frequently indicated that "a trade secret need not be a patentable invention." *Jet Spray Cooler, Inc.* v. *Crampton*, 385 N.E.2d 1349, 1355 (1979).

> (1) the extent to which the information is known outside of the business;
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> (2) the extent to which it is known by employees and others involved in the business;
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> (3) the extent of measures taken by the employer to guard the secrecy of the information;
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> (4) the value of the information to the employer and its competitors;
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> (5) the amount of effort or money expended by the employer in developing the information; and
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> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Jet Spray Cooler, Inc. v. *Crampton*, 282 N.E.2d 921, 925 (1972).

The protection afforded to trade secrets is widely recognized under both federal and state law. In *Board of Trade of Chicago* v. *Christie Grain & Stock Co.*, 198 U.S. 236, 250 (1905), the U.S. Supreme Court stated that the board has "the right to keep the work which it had done, or paid for doing, to itself." Similarly, courts in other jurisdictions have found that "[a] trade secret which is used in one's business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it, is private property which could be rendered valueless ... to its owner if disclosure of the information to the public and to one's competitors were compelled." *Mountain States Telephone and Telegraph Company* v. *Department of Public Service Regulation*, 634 P.2d 181, 184 (1981).

II. ARGUMENT.

The attachments to AT&T's responses to VZ-ATT 1-38, 1-39, 1-70, 1-131 and 1-135 and AT&T's responses to VZ-ATT 1-72, 1-114, 1-117 through 1-128, and 2-91 contain competitively sensitive and proprietary information and trade secrets. The information contained in the responses that are the subject of this motion was developed by AT&T at AT&T's expense

for its own internal purposes. This information is not publicly available, is not shared with non-AT&T employees for their personal use and is not considered public information. Any dissemination of these guidelines to non-AT&T employees, such as contract consultants, is done so on a proprietary basis. Even AT&T employees who review these materials are subject to non-disclosure agreements and are allowed to use them for internal business reasons only. Furthermore, as discussed in more detail below, these materials are valuable commercial information that competitors could unfairly use to their own advantage. Thus, these materials should be granted proprietary treatment and should not be placed on the public record.

A. VZ-ATT 1-38 and VZ-ATT 1-39

In response to VZ-ATT 1-38 and VZ-ATT 1-39, AT&T provided two CD-ROMs which contain the current AT&T engineering guidelines used by AT&T personnel to engineer both AT&T's local network (VZ-ATT 1-38) and its long distance network (VZ-ATT 1-39). These guidelines form the basis of AT&T's operations and are extremely valuable to AT&T and would be to its competitors if they were allowed to have them. AT&T spent a vast amount of time and resources in developing these guidelines, which are not publicly available and are not widely disseminated, even within AT&T. If these guidelines were placed in the public record, AT&T's competitors would gain a tremendous and unfair competitive advantage because they would not have to invest resources to develop their own guidelines, could use information taken from AT&T to improve any existing guidelines that they might have, and would gain intimate knowledge of the details of AT&T's own network. Thus, these materials should be granted proprietary treatment and not be placed on the public record.

B. VZ-ATT 1-70

In response to VZ-ATT 1-70, AT&T provided pricing information relating to its most recently installed digital switch. This information is highly proprietary for two reasons. First,

the response identifies the location of AT&T's most recently installed digital switch. This information provides AT&T's competitors with a window into AT&T's strategic planning and marketing strategy. This information would allow AT&T's competitors to target specific geographic areas for competition. The Department has recently recognized that proprietary treatment is necessary to avoid such targeting and prevent competitors from gaining an unfair competitive advantage. *See* Interlocutory Order On Verizon Massachusetts' Appeal Of Hearing Officer Ruling Denying Motion For Protective Treatment, D.T.E 01-31 (August 29, 2001) ("Interlocutory Order") at 9.

Second, the response to VZ-ATT 1-70 contains pricing information of the kind that the Department has previously recognized is proprietary and should not be made available on the public record. *See, e.g.*, *Colonial Gas Company*, D.P.U. 96-18 at 4 (1996). Indeed, in the present docket, Verizon has already sought protection of similar pricing information. *See* Verizon's Motion for Confidential Treatment filed August 8, 2001, at 9. According to Verizon, "[t]he public disclosure of information, such as terms and pricing, contained within the agreement between Verizon MA and the third party vendor would compromise the integrity of the agreement. Verizon MA regularly seeks to prevent dissemination of this information in the ordinary course of its business. Also, disclosure of such information would place both Verizon MA and its vendor at a competitive disadvantage." *Id.* Such arguments are equally applicable here.

Finally, it is also relevant that the information contained in the response to VZ-ATT 1-70 was developed by AT&T at AT&T's expense for its own internal purposes. This information is not publicly available, is not shared with non-AT&T employees for their personal use and is not considered public information. Any dissemination of this information to non-AT&T employees,

such as contract consultants, is done so on a proprietary basis. Even AT&T employees who review these materials are subject to non-disclosure agreements and are allowed to use them for internal business reasons only.

Thus, AT&T's response to VZ-ATT 1-70 is entitled to protective treatment.

C. VZ-ATT 1-131 and VZ-ATT 1-135

The attachments to AT&T's responses to VZ-ATT 1-131 and VZ-ATT 1-135 contains the actual future net salvage values and reserve percentages of AT&T's embedded plant. These data provide AT&T's competitors direct insight into AT&T's internal investments, in particular into the relative age and depreciation of AT&T's network facilities. This is valuable commercial information that competitors could unfairly use to their own advantage because it provides them with knowledge of whether AT&T has been engaged in extensive recent development of new facilities and whether AT&T will have to make substantial investments in the near future. The Department has recently recognized that a company's levels of investment is proprietary information because "disclosure of this information could assist [the company's] competitors in development of sales and investment strategies." *See* Hearing Officer Ruling on Verizon Massachusetts' Motions for Confidential Treatment, DTE 01-31 (August 29, 2001) ("HO Ruling") at 4 (granting Verizon motion in part).

Furthermore, the information contained in the response to VZ-ATT 1-131 and 1-135 was developed by AT&T at AT&T's expense for its own internal purposes. This information is not publicly available, is not shared with non-AT&T employees for their personal use and is not considered public information. Any dissemination of this information to non-AT&T employees, such as contract consultants, is done so on a proprietary basis. Even AT&T employees who review these materials are subject to non-disclosure agreements and are allowed to use them for internal business reasons only.

Thus, these materials should be granted proprietary treatment and not be placed on the public record.

D. VZ-ATT 1-74, VZ-ATT 1-120 and VZ-ATT 1-121

AT&T's responses to VZ-ATT 1-74, VZ-ATT 1-120 and VZ-ATT 1-121 contain information relating to the type of and extent of the signaling network that is utilized by AT&T in its local network. This type of information is highly sensitive and would provide AT&T's competitors with a valuable insight into AT&T's plans for the local services market. For example, whether a CLEC has constructed its own switching network or whether it relies on a third-party to provide such a network for its use will give insight to the CLEC's competitors into how deep the CLEC's market penetration is and into the CLEC's future plans for expansion into the local services market. Such information is highly sensitive and would provide the CLEC's competitors with an invaluable and unfair competitive advantage. This is exactly the type of information that G.L. c. 25, § 5D was designed to protect and that the Department has traditionally protected.

It is also notable that the information contained in these responses was developed by AT&T at AT&T's expense for its own internal purposes. This information is not publicly available, is not shared with non-AT&T employees for their personal use and is not considered public information. Any dissemination of this information to non-AT&T employees, such as contract consultants, is done so on a proprietary basis. Even AT&T employees who review these materials are subject to non-disclosure agreements and are allowed to use them for internal business reasons only.

Thus, the Department should grant protective treatment to AT&T's responses to VZ-ATT 1-74, VZ-ATT 1-120 and VZ-ATT 1-121.

E. VZ-ATT 1-114

AT&T's response to VZ-ATT 1-114 identifies the switch fill rate and transmission terminal equipment fill rate of AT&T's local network. The information contained in AT&T's response to VZ-ATT 1-114 was developed by AT&T at AT&T's expense for its own internal purposes. This information is not publicly available, is not shared with non-AT&T employees for their personal use and is not considered public information. Any dissemination of this information to non-AT&T employees, such as contract consultants, is done so on a proprietary basis. Even AT&T employees who review these materials are subject to non-disclosure agreements and are allowed to use them for internal business reasons only.

Furthermore, the data provided in response to VZ-ATT 1-114 are valuable commercial information that competitors could unfairly use to their own advantage because they would provide those competitors with a glimpse into AT&T's internal investments. As with the depreciation related data provided in response to VZ-ATT 1-131 and VZ-ATT 1-135, these data would provide AT&T's competitors with knowledge of whether AT&T has been engaged in extensive recent development of new facilities and whether AT&T will have to make substantial investments in the near future. As noted above, the Department has recognized that a company's levels of investment is proprietary information because "disclosure of this information could assist [the company's] competitors in development of sales and investment strategies." *See* HO Ruling at 4. It also might provide AT&T's competitors with insight into AT&T's current market penetration and expected future market penetration. Thus, this response should be granted proprietary treatment and not be placed on the public record.

F. VZ-ATT 1-122 and VZ-ATT 1-123

In VZ-ATT 1-122, Verizon asked AT&T to identify the location of land which AT&T has used for switching or indoor transmission facilities in the last five years. In VZ-ATT 1-123,

Verizon asked AT&T to identify the location of buildings which AT&T has constructed to be used for switching or indoor transmission facilities in the last five years. Verizon has also sought the actual investments that AT&T has made for this land and these buildings. This information is proprietary for at least two reasons.

First, the answers provide competitors with information relating to AT&T's current level of market penetration and future planned level of penetration. For example, if AT&T's investment levels are high, AT&T's competitors could reasonably conclude that AT&T's current penetration is extensive or its planned penetration is intended to be extensive. If AT&T's investment levels are low, AT&T's competitors could reasonably draw a different conclusion.

Second, the answers provide competitors with the actual locations where AT&T's penetration has occurred and what the level of that penetration is. Possession of this information would allow competitors to target specific geographical areas for competition. As noted above, the Department has recently ruled that this type of information is specifically entitled to protective treatment. *See* Interlocutory Order at 9.

Furthermore, the information contained in these responses was developed by AT&T at AT&T's expense for its own internal purposes. This information is not publicly available, is not shared with non-AT&T employees for their personal use and is not considered public information. Any dissemination of this information to non-AT&T employees, such as contract consultants, is done so on a proprietary basis. Even AT&T employees who review these materials are subject to non-disclosure agreements and are allowed to use them for internal business reasons only.

Thus, the Department should grant proprietary treatment to AT&T's responses to VZ-ATT 1-122 and VZ-ATT 1-123.

G. VZ-ATT 1-117 through VZ-ATT 1-119 and VZ-ATT 1-124 through VZ-ATT 1-128

In its responses to VZ-ATT 1-117 through VZ-ATT 1-119 and VZ-ATT 1-124 through VZ-ATT 1-128, AT&T reveals its actual investments for a number of components of its own network including: its investments per operator position[2], its investments per public telephone station[3], its investments per installed DS-1 channel bank[4], its investments per installed OC-48 drop multiplexer[5], its investments per OC-48 optical regenerator[6], its investments per optical distribution panel[7], its investment per foot for placing fiber optic cable in trenches[8], and its investment per foot in underground conduit for fiber optic cable.[9] This information was developed by AT&T at AT&T's expense for its own internal purposes. This information is not publicly available, is not shared with non-AT&T employees for their personal use and is not considered public information. Any dissemination of this information to non-AT&T employees, such as contract consultants, is done so on a proprietary basis. Even AT&T employees who review this information are subject to non-disclosure agreements and are allowed to use them for internal business reasons only. Therefore, these materials clearly meet the definition of trade secrets.

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[2] AT&T response to VZ-ATT 1-117.

[3] AT&T response to VZ-ATT 1-118.

[4] AT&T response to VZ-ATT 1-119.

[5] AT&T response to VZ-ATT 1-124.

[6] AT&T response to VZ-ATT 1-125.

[7] AT&T response to VZ-ATT 1-126.

[8] AT&T response to VZ-ATT 1-127.

[9] AT&T response to VZ-ATT 1-128.

Furthermore, these materials are valuable commercial information that competitors could unfairly use to their own advantage because it would provide those competitors with a glimpse into AT&T's internal investments. As with some of the other responses discussed above, AT&T's level of investments could provide insight into its current or intended market penetration and could provide them with unfair marketing and investment planning advanatages. *See* HO Ruling at 4. It could also provide AT&T's competitors with information relating to the pricing of certain network components in which AT&T has invested. As noted above, the Department has recently accorded protective treatment to exactly this type of information. *See, e.g.*, *Colonial Gas Company*, D.P.U. 96-18 at 4 (1996); *see also* Verizon's Motion for Confidential Treatment filed August 8, 2001, at 9 (seeking protective treatment of pricing information)(discussed in detail above). Thus, these materials should be granted proprietary treatment and not be placed on the public record.

H. VZ-ATT 2-91

AT&T's response to VZ-ATT 2-91 contains information that reveals the level of AT&T's provisioning of splitter shelves and splitter cards in connection with offering DSL services. This information provides AT&T's competitors with insight into AT&T's current level of market penetration and future plans for offering DSL services. As such, the information, if placed on the public record, would afford AT&T's competitors a substantial and unfair competitive advantage. This information may also allow AT&T's competitors to target specific services or locations for investment. The Department's recent order in docket number 01-31 recognized the need for proprietary treatment of such information. *See* Interlocutory Order at 9.

Finally, the information contained in these responses was developed by AT&T at AT&T's expense for its own internal purposes. This information is not publicly available, is not shared with non-AT&T employees for their personal use and is not considered public

information. Any dissemination of this information to non-AT&T employees, such as contract consultants, is done so on a proprietary basis. Even AT&T employees who review these materials are subject to non-disclosure agreements and are allowed to use them for internal business reasons only.

Thus, these materials contain exactly the type of information that G.L. c. 25, § 5D was designed to protect and that the Department has traditionally protected. The Department should grant protective treatment to these responses.

Conclusion.

For these reasons, AT&T requests in accordance with G.L. c. 25, § 5D that the Department grant protective treatment to the attachments to AT&T's responses to VZ-ATT 1-38, 1-39, 1-70, 1-131 and 1-135 and AT&T's responses to VZ-ATT 1-72, 1-114, 1-117 through 1-128, and 2-91.

Respectfully submitted,

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